Supreme Court, U.S.
FILED
MAR 3 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1125

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

DAVID L. WILKINSON,
Attorney General of the State of Utah,
Appellant,

v.

CONNIE R. JONES, *et al.*,
Appellees.

On Appeal from the United States Court of Appeals for the Tenth Circuit

---

REPLY TO MOTION TO AFFIRM

REX E. LEE *
Special Assistant
Attorney General
for the State of Utah
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
Telephone: (202) 429-4000

RALPH L. FINLAYSON
Assistant Attorney General
for the State of Utah
236 State Capitol
Salt Lake City, Utah 84114
Telephone: (801) 533-7626

CHARLES A. HOBBS
THEODORE A. SHIELDS
Special Assistant
Attorney General for
the State of Utah
HOBBS, STRAUS, DEAN
& WILDER
1819 H Street, N.W.
Washington, D.C. 20006
Telephone: (202) 783-5100

RICHARD G. WILKINS
Special Assistant
Attorney General
for the State of Utah
1042 East 850 North
Orem, Utah 84057
Telephone: (801) 225-9085
Counsel for Appellant

* Counsel of Record

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

TABLE OF CONTENTS

QUESTIONS PRESENTED:	Page
I. THE CONSTITUTION DOES NOT FORBID ALL REGULATION OF INDECENT BUT NON-OBSCENE SPEECH ON CABLE TELEVISION	2
II. THE ACT IS NOT UNCONSTITUTIONALLY VAGUE	3
III. THE ACT IS NOT PLAINLY UNCONSTITUTIONAL	6
IV. THE ACT IS NOT FEDERALLY PREEMPTED	8
CONCLUSION	11

TABLE OF AUTHORITIES

CASES Page

Brockett v. Spokane Arcades, Inc., 105 S.Ct. 2794, 2802 (1985) 3
Butler v. Michigan, 352 U.S. 380, 383 (1957) 7
Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691 (1984) 8
FCC v. Pacifica Foundation, 438 U.S. 726, 744 (1978) ..... *passim*
Florida Lime and Avocado Growers v. Paul, 373 U.S. 132, 142 (1963) 10
Miller v. California, 413 U.S. 15, 24 (1973) 4
Newman v. Piggie Park Enterprises, 390 U.S. 400, 401 (1968) 10
New York v. Ferber, 485 U.S. 755, 759 (1982) 6
Sedima, S.P.R.L. v. Imrex Co., 87 L.Ed.2d 346 361 (1985) 4
Zarcone v. Perry, 581 F.2d 1039, 1044 (2d Cir. 1978) 10

STATUTES

18 U.S.C. § 1464 (1982) 4
Cable Communications Policy Act, 47 U.S.C. § 558 (App. I at 128a) 8, 9, 10
Utah Code Ann. § 67-5-1(5) (1978) 5

LEGISLATIVE HISTORY

130 Cong. Rec. S14289 (daily ed. Oct. 11, 1984) 9
130 Cong. Rec. S14285 (daily ed. Oct. 11, 1984) 9

MISCELLANEOUS

Smith, Battle Intensifying Over Explicit Sex on Cable TV, N.Y. Times, October 3, 1983, at A1 col. 1 and section 3, p. 22 col. 6 1

REPLY TO MOTION TO AFFIRM

The Motion to Affirm ("M.A.") does not dispute that the primary issue presented by this appeal—"whether the First Amendment denies government any power" to restrict the dissemination of indecent material on cable television "in any circumstances" (*FCC v. Pacifica Foundation*, 438 U.S. 726, 744 (1978) (opinion of Stevens, J.))—is within the appellate jurisdiction of the Court. M.A. at 9. The Motion, moreover, effectively concedes that this question, answered as to the broadcast media in *Pacifica*, is a substantial one meriting plenary review. *Id.*[1] The Motion merely asserts that the Court need not reach that important issue because the Utah Cable Television Programming Decency Act (the "Act") is unduly vague (M.A. at 10-15), the Act is preempted by the Cable Communications Policy Act (M.A. at 22-26), and the lower courts properly disregarded this Court's decision in *Pacifica* (M.A. at 15-20).

None of the grounds raised by appellees in support of summary affirmance is meritorious. The Utah Act is substantially less vague than the indecency statute upheld in *Pacifica*. The Act, furthermore, is not preempted unless unconstitutional (Jurisdictional Statement ["J.S."] at 10 & n.18) and this Court—not the lower federal courts—should determine whether the significant constitutional and regulatory interests recognized in *Pacifica* have any vitality outside the realm of FM radio.

---

[1] Indeed, counsel of record for the appellees was quoted in a newspaper article written four years ago which concluded that "the issue of sexually explicit programming on cable television will ultimately be decided in the Supreme Court." Smith, *Battle Intensifying Over Explicit Sex on Cable TV*, N.Y. Times, Oct 3, 1983 at A1 col. 1 and section 3, p. 22 col. 6. " 'The resolution of whether cable is to be more like broadcasting or more like newspapers,' Mr. [Floyd] Abrams, the New York lawyer, said, 'will determine a good deal of the future of what our country is likely to be watching in years to come.' " *Id.*

As evidenced by the amicus brief filed by 10 states in support of the Jurisdictional Statement,[2] this case raises a fundamental issue of serious regulatory and constitutional concern: Can government take any steps to mediate the interests of parents and others who object to the intrusion of patently offensive, sexually explicit programming into the home on family format cable television and the concomitant widespread availability of such programming to children, with the conflicting interests of those who assert the unrestrained constitutional right to distribute whatever material they desire so long as it falls short of hard-core obscenity? This important constitutional conflict is presented in its starkest terms by the present case, and this Court should note probable jurisdiction to provide needed guidance to the states in the exercise of their police power.

I. THE CONSTITUTION DOES NOT FORBID ALL REGULATION OF INDECENT BUT NON-OBSCENE SPEECH ON CABLE TELEVISION

Appellees' principal submission is that the Court should decline review because the precise coverage of the Utah Act is speculative. *See* M.A. at 10-15. The suggestion is ironic in light of appellees' broad facial attack on the Act and, in any event, is wide of the mark.

Any speculation or abstract uncertainty regarding the interpretation of the Act exists because appellees chose to attack the Act on its face, the day after passage, before any Utah government official could even consider concrete enforcement of its provisions. Appellees' discussion of the Act's applicability to "Carnal Knowledge" or "Kramer v. Kramer" (M.A. at 12-13) is accordingly premature. The fundamental question raised by this case is not—as appellees would have it—whether the Act is unconstitutional because of potentially troublesome questions of coverage in close cases. *Compare* M.A. at 12-15

---

[2] *Wilkinson v. Jones*, No. 86-1125 (October Term 1986), Brief of Amici Curiae, the States of Arizona, Kansas, Mississippi, Missouri, New Hampshire, New Mexico, Pennsylvania, South Carolina, Washington and West Virginia.

with J.S. at 24-27. On the contrary, the primary issue here is whether the Act should be struck down on its face because it has no conceivable constitutional application. J.S. at 25-27; *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. 2794, 2802 (1985) (the overbreadth doctrine does not apply unless the "overbreadth is incurable and would taint all possible applications of the statute").[3]

The fundamental constitutional questions identified in the Jurisdictional Statement are sharply presented here. The lower courts refused to consider such facts as the types of materials that would, in the opinion of the State Attorney General, prompt enforcement actions under the Act. J.S. at 9-10. *See* App. B at 56a ("Few facts are relevant to a facial challenge, because the law at issue is not analyzed in a factual context"). The lower courts did not debate, as appellees now attempt to do, whether "Carnal Knowledge" or "Kramer v. Kramer" falls within or without the Act. M.A. at 14. Instead, those courts held the Act facially unconstitutional because the "statute regulates 'indecent' material and does not limit itself to material that is legally obscene." App. B at 59a; App. A at 5a. Thus, the Court is squarely presented with a narrow constitutional issue it has faced before: Whether the First Amendment denies government "any power to regulate" the electronic dissemination of material that "is indecent but not obscene." *Pacifica*, 438 U.S. at 729. Appellees to the contrary, there is no sound reason for this Court to avoid resolution of that vital question.

II. THE ACT IS NOT UNCONSTITUTIONALLY VAGUE

Appellees assert that the Court need not review the Act because "the statute is a textbook example of a law

---

[3] Appellees either misconstrue or choose to ignore the import of the above. At pages 20-21 of the Motion to Affirm, they suggest that the lower courts properly reached their facial attack on the Act, but they nevertheless anomalously urge the Court to now decide the case on "narrower constitutional grounds." Appellees, however, presented the lower courts with the broadest of all possible arguments: that the Act is facially invalid. They cannot duck that issue once in this Court.

that fails adequately to describe that which it seeks to proscribe." M.A. at 10. The argument is pure hyperbole.

As an initial matter, the Act's language is considerably more precise than the federal indecency statute involved in *Pacifica*. There, the Court confirmed the constitutionality of a statute providing a $10,000 fine or imprisonment for "[w]hoever utters any obscene, indecent, or profane language by means of radio communication." 18 U.S.C. § 1464 (1982); *Pacifica*, 438 U.S. at 726 n.3, 738-751. In contrast with the stark and completely undefined terms of that statute, the Utah Act surely does not suffer an "incurable lack of ascertainable standards of conduct." M.A. at 15. Indeed, the language of the Act is no more vague than civil and criminal statutes routinely sustained by the Court.[4]

The principal elements of the Utah Act are drawn directly from opinions of this Court dealing with regulation of obscene and indecent speech. The requirement that "indecent materials" be "patently offensive" is derived directly from this Court's decision in *Miller v. California*,[5] as is the Act's reference to "contemporary community standards."[6] The "nuisance" theory on which the Act proceeds, as well as its requirement that "patent offensiveness" be determined after a full consideration of the "time, place, manner and context in which the material is presented," are likewise drawn from *Pacifica*. There, the Court upheld the FCC's regulation of indecent broadcast speech only because the regulation "rested on a nuisance rationale" which required "consideration of a

---

[4] The "continuing course of conduct" element of the Utah Act, for example, is surely no more suspect on general vagueness grounds than the "pattern of racketeering activity" requirement embodied in RICO. *See, e.g., Sedima, S.P.R.L. v. Imrex Co.*, 87 L.Ed.2d 346, 361 (1985) (the "pattern of racketeering activity" element of 18 U.S.C. § 1962 (1982) not questioned for vagueness despite "the failure of Congress and the courts to develop a meaningful concept of 'pattern' ").

[5] 413 U.S. 15, 24 (1973) (obscene matter must, *inter alia*, "portray sexual conduct in a patently offensive way").

[6] *Id.*

host of variables," including "time of day," "content of the program," "composition of the audience", and "context." 438 U.S. at 750.

In these circumstances, the assertion that the Act deserves summary invalidation (M.A. at 10-15) is insubstantial. J.S. at 22. In any event, numerous official sources largely ignored by appellees elucidate the meaning of the Act.

Appellees suggest that the Act is vague because it does not specify "the time of day when indecent programming [can] be shown." M.A. at 11. The indecency statute upheld in the one case that treats this issue, however, also includes no such specification. *Pacifica*, 438 U.S. at 731 n.3. The *only* difference between *Pacifica* and the Utah Act in this respect is that, here, the formal opinion of the Attorney General interpreting the Act and establishing enforcement policies, and the judicial and legislative sources upon which that opinion rests, effectively vitiate any such "vagueness" objection.[7]

The Attorney General's opinion, far from being "inexplicable," or without "statutory basis," M.A. at 11, 4, is a reasonable interpretation of the Act's own "time, place, manner and context" language. The opinion, including its enforcement guidelines, was based on the Act itself, the Act's intent statement, the debates preceding

---

[7] Appellee's suggestion (M.A. at 14 n.12) that formal opinions of the Attorney General are nothing more than advisory expressions of his views is flatly contrary to numerous decisions of this Court which recognize the authoritative character of such opinions. *See* J.S. at 24 n.42. Moreover, contrary to the assertion of appellees, it is the "duty" of the Attorney General "to exercise supervisory powers over the . . . county attorneys of the state in all matters pertaining to the duties of their offices. . . ." Utah Code Ann. § 67-5-1(5) (1978). These powers include, of course, supervisory authority with regard to enforcement policies. Thus, the responsibility of the Attorney General extends even beyond the duty to render interpretations of statutes, and includes the duty to provide binding guidelines to county attorneys. As a practical matter, city attorneys can be expected to follow the guidelines as well, especially since the municipalities, even if they were disposed to ignore the guidelines, do not have sufficient financial resources to fight the cable companies to final judicial resolution.

passage of the Act, and this Court's opinions. Those materials, summarized in the Jurisdictional Statement (at 4-8), make clear that the purpose of the Act is not to ban indecency, as asserted by appellees (M.A. at 18), but rather to channel objectionable, explicit sexual materials to late evening hours or other contexts where their presentation will not be patently offensive. Furthermore, the legislative debates, upon which the opinion drew heavily, reflect the legislative sponsors' close familiarity with and incorporation of the decisions of this Court dealing with the regulation of obscenity and indecency. J.S. at 4-7 & n.14. Essentially, the Attorney General was saying that he would "not second guess this legislative judgment." *New York v. Ferber*, 485 U.S. 755, 759 (1982).

III. THE ACT IS NOT PLAINLY UNCONSTITUTIONAL

The constitutional issues presented by this case are identical to those presented in *Pacifica*—only the context is different. *Pacifica* involved regulation of indecent broadcasts on FM radio; this case involves regulation of indecent programs on cable television. *Pacifica* held that limited regulation of indecent broadcasts is constitutionally sound; the lower courts necessarily held exactly the opposite with respect to cablecasts. Therefore, appellees' claim that the Utah Act is plainly unconstitutional (M.A. at 15-20) is absurd. To reach that conclusion this Court, like the lower courts, would first have to render *Pacifica* a virtual dead letter. *See* J.S. at 17.

Appellees, to avoid the force of the above, make some efforts to distance this matter from *Pacifica*. That case, however, cannot be rationally distinguished from the present controversy. *Pacifica* involved the regulation of indecent material on a nuisance rationale. 438 U.S. at 750. So does the present case. J.S. at 23-24. Both FM radio and cable television have a pervasive presence in modern society, and both are available in the home.[8]

---

[8] Appellees seek to turn the "pervasiveness" issue into a matter of metaphysics. Cable television is not "pervasive," they assert, because its signal travels through a cable rather than through the

Finally, cable television, no less than FM radio, is uniquely accessible to children.[9]

Appellees suggest that this case is somehow different from *Pacifica* because that decision was "forged in the context of Federal Communications Commission ('FCC') review of programs presented by a government-licensed radio broadcaster." M.A. at 9. This submission, however, fails to recognize that the *Pacifica* holding is based on the meaning of the First Amendment, and not on an interpretation of the Federal Communications Act.[10] The people of the State of Utah and other states[11] are just as entitled to have this Court declare the scope of their constitutionally permissible rights to legislate in this important area as is the Federal Communications Commission.

The only differences between this case and *Pacifica* are that this case involves cable television instead of FM radio, and it comes up on appeal rather than certiorari. Both of these differences cut in favor of plenary review. Cable television is, if anything, more pervasive (in the

---

atmosphere. M.A. at 16. But, aside from the incongruity of suggesting that constitutional law should turn on such metaphysical distinctions, the argument fails on its own terms. As pointed out in the Jurisdictional Statement, cable television signals are indeed distributed through the atmosphere—just as broadcasting signals. Only the final stage of transmission takes place through cable. J.S. at 3 n.3.

[9] On this point, appellees assert that, while the federal government acted properly to shield young children from indecent material in *Pacifica*, the identical interest in protecting youth does not justify the Utah Act. M.A. at 18. Utah, they assert, may not "'reduce the adult population . . . to [watching] only what is fit for children.'" *Id.* (quoting *Butler v. Michigan*, 352 U.S. 380, 383 (1957)). But, whether appellees are correct on this submission is, at this point, simply irrelevant. In *Pacifica*, this Court rejected the *Butler v. Michigan* objection. 438 U.S. at 749-750 & n.28. Thus, appellees are essentially arguing that *Pacifica* was wrongly decided. That assertion alone justifies full consideration of this case by the Court.

[10] *Cf.* 438 U.S. at 778-780 (Stewart, J., dissenting).

[11] *See* amicus brief, note 2 *supra*.

sense the *Pacifica* majority used that term)[12] than FM radio. Its capacity to make an instantaneous and lasting impression on children is greater, simply because it employs pictures as well as words.[13] As to the other difference—certiorari versus appeal—the appellees' response to the Jurisdictional Statement is a Motion to Affirm. The Tenth Circuit's judgment cannot be affirmed per curiam without tacitly overruling *Pacifica* or at least limiting that precedent to its facts. That result is far too important for summary treatment, as even appellees recognize. *See* M.A. at 9. The questions presented here should be decided by this Court, and not left to lower federal courts.

IV. THE ACT IS NOT FEDERALLY PREEMPTED

Appellees argue that the Cable Communications Policy Act preempts the Utah Act. M.A. at 22-26. They cite section 638 of the federal Act, 47 U.S.C. § 558 (App. I at 128a), which explicitly authorizes the states to apply "obscenity . . . or other similar laws" to cablecasters, and make abstract arguments that Congress must not have intended to include indecency within the phrase "other similar laws." The legislative history of the Cable Communications Policy Act unequivocally demonstrates the contrary.[14] The legislative reports cited in the Jurisdictional Statement (at 10 n.18) show that Congress intended state indecency provisions, so far as constitutional, to be within the regulatory authority of the states.

---

[12] *See* 438 U.S. at 748-749 and note 8, *supra*.

[13] Cable television can do more than "enlarge[] a child's *vocabulary* in an instant." *Pacifica*, 438 U.S. at 749 (emphasis added).

[14] Appellees also argue that state indecency statutes must be preempted because of the effect such statutes might have on the interstate transmission of cable programs. M.A. at 24-25 (citing *Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691 (1984)). The argument, however, is addressed to the wrong forum. Congress specifically chose in section 638 of the Cable Communications Policy Act not to preempt state indecency statutes. Appellees' assertions regarding the supposed chaotic results of that choice should be directed to Congress—not this Court.

The debates and colloquies surrounding the enactment of the federal statute are even more explicit. On June 26, 1984, there was a markup session of the House Committee on Energy and Commerce (the committee that reported the bill which became the Cable Communications Policy Act) during which Congressman Nielson of Utah and Committee Chairman John Dingell exchanged the following remarks:

> Cong. Nielson: I would also like to clarify that laws regulating indecency are included under section 639 [now 638], through the use of the phrase 'other similar laws,' as long as these laws are constitutional.
>
> Chairman Dingell: Yes. Indecency is similar to obscenity, and thus would be included as long as such laws are constitutional.[15]

A similar colloquy between Senators Goldwater[16] and Trible on the date the House and Senate accepted the House Committee version of Section 638 was inserted into the Congressional Record to explicate the reach of that provision (130 Cong. Rec. S14289 (daily ed. Oct. 11, 1984):

> Mr. Trible: I also wish to ask whether section 638 applies to Federal, State and local laws dealing with indecency on cable television?
>
> Mr. Goldwater: Yes, it does and that is the understanding of the conferees. Indecency laws are related to laws prohibiting obscenity, and thus would be covered by the phrase from section 638: "and other similar laws." Under this section, Federal, State, and local laws regulating indecency on cable would be preserved.[17]

---

[15] The transcript of this session was not officially printed. An unofficial transcript was verified by the affidavit of Congressman Nielson. Rec. 694-697.

[16] Senator Goldwater was the chairman of the Communications Subcommittee of the Senate Commerce Committee, and the sponsor of S. 66, the bill that ultimately became the Cable Communications Policy Act.

[17] This colloquy was specifically designated as part of the legislative history of the bill. 130 Cong. Rec. S14285 (daily ed. Oct. 11,

Every Senator or Congressman who spoke on the subject did so in favor of the freedom of the states to regulate indecency, provided only that such regulation was constitutional. There is no evidence that any member of Congress disagreed with this sentiment.[18] In light of the plain language of the Cable Communications Policy Act and the legislative history, set out above, appellees' suggestion that summary affirmance is appropriate here on preemption grounds is simply irrational.[19]

1984). It therefore is of no significance, as the district court thought, that it was written rather than spoken into the record. App. B at 53a.

[18] One who claims that state authority is federally preempted has the burden of proving it; all doubts are to be resolved against preemption. *Florida Lime and Avocado Growers v. Paul*, 373 U.S. 132, 142 (1963). In his concurring opinion below, Judge Baldock agreed that the federal Cable Policy Act did not preempt the Utah Act, App. A at 12a-15a.

[19] Appellees did not make extensive arguments regarding the attorneys fee issue raised in the Jurisdictional Statement. M.A. at 22-23 n.20. The issue is within the appellate jurisdiction of the Court (J.S. at 2 n.1) and is, in any event, an important question meriting review. Congress clearly did not intend to provide windfall attorneys' fees to wealthy litigants in circumstances such as those of this case. *See* J.S. at 27-30; *see also Zarcone v. Perry*, 581 F.2d 1039, 1044 (2d Cir. 1978), *cert. denied*, 439 U.S. 1072 (1979) (fees not to be awarded unless "a person in the plaintiff's position would have been deterred or inhibited from seeking to enforce civil rights without an assurance that his attorney's fees would be paid if he were successful"). Moreover, although awards of attorneys fees to prevailing parties are "ordinarily" appropriate in civil rights actions unless "unjust" (*Newman v. Piggie Park Enterprises*, 390 U.S. 400, 401 (1968)), this is not an ordinary case and the award of fees here is unjust. See J.S. at 29-30.

Here, the State is defending legislation conscientiously drawn within the guidelines offered by the language of this Court's decisions. It has previously been noted that state legislation should be upheld where "[b]oth the text and the background of [the] statute indicate that the state legislature sought to conform" its law to constitutional standards outlined in the opinions of the Court. *Brockett v. Spokane Arcades, Inc.*, 105 S.Ct. 2794, 2805 (1985) (O'Connor, J., concurring).

CONCLUSION

Probable jurisdiction should be noted.

Respectfully submitted,

REX E. LEE *
Special Assistant
Attorney General
for the State of Utah
SIDLEY & AUSTIN

RALPH L. FINLAYSON
Assistant Attorney General
for the State of Utah

RICHARD G. WILKINS
Special Assistant
Attorney General
for the State of Utah

CHARLES A. HOBBS
THEODORE A. SHIELDS
Special Assistant
Attorney General for
the State of Utah
HOBBS, STRAUS, DEAN
& WILDER

Counsel for Appellant

* Counsel of Record

March 3, 1987